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82-601

No. ____

In The

Supreme Court of the United States

October Term, 1982

ROBERT PARRATT, WARDEN OF THE NEBRASKA STATE PENITENTIARY,

Petitioner,

vs.

RICHARD DEAN HOLTAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. As a general rule the Supreme Court of Nebraska only considers on appeal issues specifically assigned as error in the brief of the appellant. The habeas corpus petitioner in this case did not specifically assign as error in his appeal of a state post conviction proceeding the issue upon which the Court of Appeals has granted 28 U. S. C. § 2254 relief. The Supreme Court of Nebraska has also indicated that in capital cases, such as the present one, it may consider issues argued by the criminal defendant but not specifically assigned. In the opinion of the Supreme Court of Nebraska denying this habeas corpus petitioner post conviction relief, no notice is taken nor mention made of the issue here in question. However, the Court of Appeals found that the issue here in question had been sufficiently "raised" by the criminal defendant before the state Supreme Court in view of that court's more liberal review standard in capital cases, and therefore no procedural default under *Engle v. Isaac*, — U. S. —, 102 S. Ct. 1588 (1982) had occurred.

Query: Whether the federal courts may properly assume that a state procedural default has not occurred on an issue where recognition of that issue rest uniquely and solely within the state appellate court's discretion and the opinion of that state appellate court contains absolutely no indication that the issue had been adequately raised for their consideration by the present habeas corpus petitioner?

2. Where the federal courts have assumed from a silent record that a particular issue was raised and con-

sidered by a state appellate court which ultimately denied the petitioner state post conviction relief, are the findings of fact implicit in the state court's denial of post conviction relief entitled to the presumption of correctness established by 28 U. S. C. § 2254 (d) and this court's ruling in *Sumner v. Mata*, 449 U. S. 539 (1981)?

3. May prejudice be presumed from the failure of counsel to seek a ruling from a state trial court on a matter addressed solely to that court's discretion?

4. May a Court of Appeals order further proceedings in a case brought under 28 U. S. C. § 2254 where that court has not found the applicant entitled to relief under that statute?

PARTIES TO THIS ACTION

In addition to those parties noted in the caption of this action, the N. A. A. C. P. Legal Defense Fund, Inc. appeared before the Court of Appeals as *amicus curiae* on behalf of Mr. Holtan.

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Parties to This Action	ii
Table of Contents	iii
Opinions Below Delivered by the Courts Below	1
Grounds for Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Argument:	
I. The circuit court has erroneously applied this court's ruling in *Engle v. Isaac*, — U. S. —, 102 S. Ct. 1588 (1982)	5
II. Applying *Sumner v. Mata*, to implicit state court findings of fact.	9
III. The finding of prejudice is erroneous	10
IV. The relief ordered is beyond the scope of § 2254	11
Conclusion	12
Appendix A	App. 1
Appendix B	App. 17
Appendix C	App. 37
Appendix D	App. 46

TABLE OF AUTHORITIES

CASES: Pages

Engle v. Isaac, — U. S. —, 102 S. Ct. 1588 (1982) 3, 4, 5, 6, 7, 8, 9

Robinson v. Yyrick, 635 F. 2d 757 (8th Cir. 1981) 11

State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876 (1977), *cert. denied*, 434 U. S. 912 3

State v. Holtan, 205 Neb. 314, 287 N. W. 2d 671 (1980) 2

State v. Peery, 199 Neb. 656, 261 N. W. 2d 95 (1977) 4, 7, 8, 9

State v. Redden, 181 Neb. 423, 149 N. W. 2d 98 (1967) 6

Sumner v. Mata, 449 U. S. 539 (1981) 6, 8, 9, 10

Wainwright v. Sykes, 433 U. S. 72 (1977) 5

STATUTE:

28 U. S. C. § 2254 ..... 1, 2, 3, 4, 8, 10, 11, 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in the above noted case on July 16, 1982.

OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of United States District Judge, Warren K. Urbom, denying the respondent relief under 28 U. S. C. 2254 is unreported and appears as Appendix B, *infra*. The

opinion of the Court of Appeals is also unreported and appears as Appendix A, *infra*.

The opinion of the Supreme Court of Nebraska at issue here is reported as *State v. Holtan*, 205 Neb. 314, 287 N. W. 2d 671 (1980), and appears as Appendix C, *infra*.

GROUNDS FOR JURISDICTION

The opinion of the Court of Appeals was filed July 16, 1982. The jurisdiction of this court is invoked under 28 U. S. C. § 2254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U. S. C. § 2254. *See*, Appendix D, *infra*.

STATEMENT OF THE CASE

The respondent here, Richard Dean Holtan, was charged in the courts of the State of Nebraska with first degree murder in the perpetration of a robbery and shooting with intent to kill, wound, or maim. These charges grew out of a robbery and homicide in Omaha, Nebraska, on October 31, 1974. Holtan entered a plea of nolo contendere to both counts, was sentenced to death on the first count and to serve 15 to 45 years on the second count. The conviction and sentence was affirmed on direct appeal.

State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876 (1977), *cert. denied*, 434 U. S. 912.

Holtan then filed for state post conviction relief alleging, among other issues, that he was not provided effective assistance of counsel in his original conviction. The state trial court denied relief on all issues raised and Holtan took an appeal to the Supreme Court of Nebraska where the denial of post conviction relief was affirmed. *State v. Ho'tan*, 205 Neb. 314, 287 N. W. 2d 671 (1980).

Holtan next sought federal habeas corpus relief under 28 U. S. C. § 2254. Among the issues raised at that point in the proceedings was whether Holtan received ineffective assistance of counsel.

> [B]y the failure of the petitioner's counsel to advise the court that the petitioner wished to withdraw his plea of no contest to the charge of first degree murder after he had been advised by counsel that the penalty which the court probably would impose was the sentence of death.

[This will be referred to hereafter as Issue I (e).]

Issue I (e) was not specifically assigned as error on Holtan's post conviction appeal to the Supreme Court of Nebraska. Appendix A, p. App. 6. The federal district court found that Holtan had not shown prejudice and denied relief. Appendix B.

On appeal the Court of Appeals first inquired into whether the failure of Holtan to assign Issue I (e) as error before the state appellate court constituted a state procedural default under *Engle v. Isaac, supra*. The only allusion to Issue I (e) in Holtan's post conviction appeal

was the following three sentences contained in the body of a broader argument.

> ' Prior to sentencing, appellant asked Carey to withdraw his plea. Carey did not do so, and Carey did not deny at the evidentiary hearing, that his client had made the request. His testimony was that he didn't recall the incident."

Brief of Appellant, Richard Dean Holtan, Supreme Court of Nebraska, No. 42452, p. 12. However, the Court of Appeals determined that although Issue I (e) had not been assigned as error before the Supreme Court of Nebraska that it had been "raised" under the case of *State v. Peery*, 199 Neb. 656, 261 N. W. 2d 95 (1977) and that no procedural default under *Engle v. Isaac, supra*, had occurred.

The Court of Appeals then determined that Holtan had been prejudiced by his counsel's failure to inform the state trial court of Holtan's desire to withdraw his nolo contendere plea, while noting that Holtan had no right to withdraw his plea and that this record does not support the conclusion that he would have been allowed to withdraw his plea had a request been made. Appendix A, p. App. 14. The Court of Appeals then reversed the District Court's denial of § 2254 relief for the following further proceedings.

> If within a reasonable time to be fixed by the district court appellant shall by appropriate pleading request of the Nebraska courts leave to withdraw his plea of nolo contendere, and if a Nebraska state court of competent jurisdiction entertains that pleading and stays execution pending its consideration of appellant's case, then the district court shall dismiss the habeas petition without prejudice. Should Nebraska decline to entertain appellant's case, the district court

shall issue its writ of habeas corpus conditioned as justice may require.

Should appellant fail to seek state court leave to withdraw his plea within the time authorized by the district court, that court shall dismiss the habeas petition, and such dismissal shall be with prejudice as to all ineffective assistance issues raised before that court.

Appendix A, pp. App. 15-16.

ARGUMENT

I.

The Circuit Court has erroneously applied this Court's ruling in Engle v. Isaac, — U. S. —, 102 S. Ct. 1588 (1982).

A.

Engle v. Isaac, supra (hereinafter *Engle*), decided this question: "[W]hether respondents may litigate, in a federal habeas corpus proceeding, a constitutional claim that they forfeited before the state courts." *Id.* at 1570. In resolving this question, *Engle* relied upon *Wainwright v. Sykes*, 433 U. S. 72 (1977) to reach the following conclusion, "[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Engle, supra* at 1572. The facts here raise the question of whether a procedural default has occurred in this case.

In this case the United States Court of Appeals for the Eighth Circuit (hereafter, Court of Appeals), determined that Holtan's Issue I (e) was not the subject of a procedural default and thus *Engle* had no application to this case (Appendix A, pp. App. 5-7). We believe either this decision is in error, as we will argue here, or that the Court of Appeals, if correct in its *Engle* analysis, did not grant due deference to the state court's rejection of this claim under *Sumner v. Mata*, 449 U. S. 539 (1981). This latter proposition will be addressed in Argument II of this brief.

B.

Our concern over the application of *Engle* to this case centers around Holtan's failure to assign Issue I (e) as error before the state Supreme Court after his attempt to obtain post conviction relief had been rejected by the state trial court. Appendix A, p. App. 6. It is accepted by all parties that, in Nebraska, consideration of an issue on appeal is limited to errors specifically assigned and discussed in the brief of the appellant. *Eg., State v. Redden*, 181 Neb. 423, 149 N. W. 2d 98 (1967). Appendix A, p. App. 6. Although Holtan conceded in his brief before the Court of Appeals on this question that "there is no specific discussion" of Issue I (e) in his state court appellate brief, the Court of Appeals found "it is clear that this issue was raised before the Supreme Court of Nebraska." *Id.*

This questionable factual conclusion is pivotal to the Court of Appeals' refusal to apply *Engle* to this case. We believe that conclusion misreads both the state law cited and the record in this case.

In *State v. Peery*, 199 Neb. 656, 261 N. W. 2d 95 (1977), another case in which a sentence of death has been imposed, the appellant strenuously argued in his state court appeliate brief, but failed to assign as error, insufficiency of the evidence to convict him. In meeting this question the Supreme Court of Nebraska held:

> The defendant in his brief argues that the evidence was not sufficient to sustain convictions for the crime of first degree murder and robbery. We shall consider the argued error, even though the same was not assigned, in view of the gravity of the crime charged and the penalty imposed.

Id., 199 Neb. at 659. What follows that holding in *State v. Peery, supra,* is a *six page* discussion of the error which was argued but not assigned. In the present case, the opinion of the state Supreme Court addresses *not a single sentence* to the issue which Holtan neglected to assign. Yet on that record the Court of Appeals determined Issue I (e) was sufficiently "raised" so as to avoid an *Engle*-type state procedural default. Appendix A, p. App. 6.

While the Court of Appeals concludes that Issue I (e) was sufficiently "raised" by Holtan to avoid a state procedural default, such a determination is *not* the Court of Appeals' to make. The determination of whether an error not specifically assigned has been adequately raised by an appellant to merit *State v. Peery, supra,* review rests *uniquely* and *solely* within the discretion of the Supreme Court of Nebraska. To find that an unassigned error was adequately raised before the Supreme Court of Nebraska to merit consideration by that court, an *affirmative recognition* of that conclusion by the state court should be found in the record of its proceedings. The Court of Appeals

should not presume the *State v. Peery, supra,* standard has been met in the mind of the state court on a silent record.

It does not seem unreasonable to assume that if the Supreme Court of Nebraska had, in fact, exercised the expanded review allowed in *State v. Peery, supra,* in the present case that some recognition or discussion of the alleged error would be contained in the opinion. Likewise, the absence of any discussion of an error *not* assigned, we believe, leads logically to the conclusion the issue was *not* deemed sufficiently raised by the state court to merit consideration and thus a state procedural default has in fact occurred.

In *Sumner v. Mata,* 449 U. S. 539 (1981) this court noted the high value placed upon findings of fact by state trial and appellate courts by the provisions of 28 U. S. C. § 2254 (d). The Supreme Court of Nebraska was denied the opportunity to make such findings due to two procedural failures on Holtan's part. First, he failed to specifically assign Issue I (e) as error to that court on appeal. Second, his fleeting discussion of that issue in the body of his brief was, we believe, not sufficient in the mind of the Supreme Court of Nebraska to "raise" the issue for consideration under the *State v. Peery, supra,* standard. As this court noted in *Engle,* it is due to exactly these types of procedural failures or defaults that "[t]he state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." *Id.* at 1572.

Mr. Holtan seeks, and has received below, findings of fact from the federal courts on issues which he never placed before the state appellate court for decision. To avoid application of this court's ruling in *Engle,* the Court

of Appeals has presumed Holtan adequately raised an issue under the *State v. Peery, supra,* standard in the absence of any affirmative recognition of that fact by the Supreme Court of Nebraska. We believe this is error. We believe this violates both the spirit and specific language of *Eng'e* and *Sumner v. Mata, supra.* We urge this court to reverse the Court of Appeals and find *Engle* applicable to Issue I (e).

II.

Applying Sumner v. Mata, to implicit state court findings of fact.

If this court should conclude that the Court of Appeals did not erroneously deny application of *Engle* to this case, then we believe that implicit in that determination is the conclusion that the Supreme Court of Nebraska *did* consider Holtan's argument now designated I (e). If the Supreme Court of Nebraska is presumed to have considered Issue I (e) then it follows with equal force that Holtan's argument must have been found factually insufficient when relief was denied. For if the Supreme Court of Nebraska can be *presumed* to have considered Issue I (e) for *Engle* purposes then one must also *presume* that the Supreme Court of Nebraska found no factual basis for granting Holtan relief when they affirmed the denial of post conviction relief.

In this posture we believe this case presents a situation similar to that presented by *Sumner v. Mata, supra.* If the Supreme Court of Nebraska is presumed to have had raised before it and rejected Holtan's argument, then we believe that a finding that the facts of Holtan's case

were insufficient to merit relief is implicit in the denial of the relief prayed for.

> State judges as well as federal judges swear allegiance to the Constitution of the United States and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.

Sumner v. Mata, supra at 549.

We believe that if the Court of Appeals desires to overturn the findings of fact implicit in the Supreme Court of Nebraska's denial of post conviction relief, then the Court of Appeals is obliged to provide an explanation of that ruling under 28 U. S. C. § 2254 (d) and this court's ruling in *Sumner v. Mata, supra.* The Court of Appeals has not done so.

III.

The finding of prejudice is erroneous.

There is no proof of prejudice on this record. This was the finding of the federal district court.

> A defendant does not have an absolute right to have a guilty plea withdrawn upon request. See *Gunn v. Kuhlman,* 479 F. Supp. 338, 343 (U. S. D. C. S. D. N. Y. 1979); see, also, *United States v. Becklean,* 598 F. 2d 1122, 1125 (C. A. 8th Cir.), cert. denied, 444 U. S. 864 (1979). In Nebraska, a trial judge may not permit the withdrawal of a guilty plea that was knowingly, intelligently, and voluntarily made unless necessary to prevent manifest injustice. *State v. Miller,* 202 Neb. 443, 444, 275 N. W. 2d 614, 616 (1979). Because a no contest plea has the same effect as a guilty plea, there is no basis for a different standard. The petitioner has made no showing that his attempt at withdrawal would have, should have, or might have been accepted by the district court. Accordingly, he has failed to

show prejudice and has not rebutted the presumption of competency.

Appendix B, p. App. 26.

The Court of Appeals recognized Holtan had no right to withdraw his plea. Appendix A, p. App. 8. All acknowledge that a motion to withdraw a plea is addressed to the discretion of the state trial court. The Court of Appeals found no basis upon the present record to conclude that such a motion would have been granted. The strongest statement the Court of Appeals could muster from this record is "the possibility that [Holtan] would be allowed to withdraw his plea is not insubstantial." Appendix A, p. App. 15. We believe this indicates that Holtan has not met his burden of proof under § 2254 and that relief may not be properly ordered.

The Court of Appeals analogy of the failure of counsel here to seek an admittedly discretionary ruling of the state courts with the failure of counsel in *Robinson v. Wyrick*, 635 F. 2d 757 (8th Cir. 1981) to take an appeal which was a matter of *right* to his client is ludicrous. The failure of counsel to seek that which is his client's right to have is clearly prejudicial. The failure of counsel to seek a ruling on a matter addressed solely to the discretion of a state trial court is not. The finding of prejudice by the Court of Appeals in this instance represents the purest form of judicial speculation. The Court of Appeals has reversed the district court's finding on this question without any conclusion that the determination of the district court was clearly erroneous.

IV.

The relief ordered is beyond the scope of § 2254.

Sumner v. Mata, supra, speaks of the singular importance of the burden of proof placed upon a § 2254 appli-

cant and its relation to the friction between state and federal interests inherent in § 2254 litigation. The Court of Appeals has here specifically found Holtan unworthy of § 2254 relief.

> We do not now direct issuance of the writ of habeas corpus nor do we either suggest or require vacation of Holtan's conviction. Rather, we vacate the judgment of the district court and remand for further proceedings.

Appendix A, p. App. 15.

Holtan has either proven his entitlement to § 2254 relief on *this* record or he has not. To order "further proceedings" in a case which has moved through the state and federal court systems for over six years is an affront to finality and a refusal on the part of the Court of Appeals to accept and exercise its responsibilities in § 2254 litigation.

CONCLUSION

For the foregoing reasons we urge this court to grant the writ prayed for.

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